AL BAKHTIAR AB SAMAT

v.

PP

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ABDUL WAHAB PATAIL JCA
BALIA YUSOF WAHI JCA
[CRIMINAL APPEAL NO: N-05-154-2010]
5 MARCH 2012

CRIMINAL PROCEDURE: *Appeal - Appeal against conviction and sentence - Trafficking in 993.8 grams cannabis - Knowledge of drugs in room - Room accessible to other persons - Whether defence an afterthought - Whether appellant legitimate right of advancing defence during prosecution's case - Whether defence put forth was a bare denial - Whether trial judge critically examined evidence of defence witnesses - Whether trial judge's decision liable for judicial correction - Failure of appellant to call witness - Whether trial judge correct in drawing adverse inference - Whether trial judge conducted balancing exercise as dictated by ss. 14 & 15 Evidence Act 1950 before admitting similar fact evidence - Whether appeal allowed*

Chief Inspector Hafiz ('SP7') together with SP1 and SP5 took up an ambush position at the road side and about ten minutes later, SP5 and SP7 saw the accused ('appellant') approaching on a motorcycle. As a result of a body search carried out, SP5 found a small black pouch from the appellant's right jeans pocket and upon further examination, five plastic packets which contained dried plant materials, later confirmed as cannabis, were found. This formed the subject of the charge under s. 6 of the Dangerous Drugs Act 1952 for possession of 30.40 grams of cannabis against the appellant. As for the trafficking charge, the prosecution's case was that, upon interrogation, the appellant led SP7 and his men to a house in Kg Parit Seberang ('the said house'). The appellant, who was guarded by L/Cpl Azhar, entered into a room in the said house and pointed to a cupboard. The appellant then took out a block of dried plant material wrapped in a transparent plastic from the cupboard and handed it over to SP7. It was later confirmed that the said material was cannabis. In his defence, the appellant disputed the version given by the prosecution alleging that he never handed the cannabis to the police. On a contrary argument, the appellant contended that it was the police who had ransacked

A the room and found the drugs in the cupboard and underneath the table but the appellant contended that he had no knowledge about the said drugs. The appellant's cousin and his uncle, deceased ('Kamil'), who was a drug addict, had access to the said room. SD2, an officer from the rehabilitation centre, confirmed
B that Kamil was a drug addict whereas, SD3 and SD4, who were the appellant's siblings and SD5, the appellant's uncle, gave evidence that Kamil stayed in the said house and the appellant's cousin, who had disappeared after the appellant's arrest, had free access to the room where the drugs was found. At the end of the
C defence case, the trial judge held that the defence was one of bare denial and an afterthought. It was also held that the fact that the appellant was arrested in respect of the 30.40 grams cannabis found on him earlier attracted the application of s. 15 of the Evidence Act 1950 ('the Act') whereby it imputed the appellant's
D knowledge of the drugs. The appellant was found guilty, convicted and sentenced to death for the offence of trafficking in 993.8 grams of cannabis. Hence this appeal by the appellant. Two main issues were raised by the appellant in this court, ie, (i) that the learned trial judge misdirected himself when he failed to appreciate
E the defence case; and (ii) that the learned trial judge misdirected himself when he acted on the evidence of the first charge as similar fact evidence to prove knowledge in respect of the trafficking charge. Further, the appellant contended that the drawing of an adverse inference by the learned trial judge under s. 114(g) of the
F Act on the failure of the defence to call L/Cpl Azhar was prejudicial to the appellant.

Held (allowing appeal; setting aside conviction and sentence; acquitting and discharging appellant)

G **Per Balia Yusof Wahi JCA delivering the judgment of the court:**

(1) The appellant's cross-examination of SP5, SP7 and SP8 and putting to these witnesses his version was part of the process of his defence. What the appellant did was merely exercising
H his legitimate right and duty of advancing his defence during the prosecution's case itself. He crystallised the said defence as evidence during the defence stage when he together with SD2, SD3, SD4 and SD5 gave evidence. Thus, the defence put forth by the appellant was not a bare denial and certainly
I was far from being an afterthought. (para 13)

(2) The room was accessible to at least two or three other persons and the drugs could have been placed there by these other persons or could have belonged to Kamil who was a confirmed drug addict. The accessibility of the room to these other persons was brought up when SP3 and SP8 were cross examined. Clearly, it could be seen that the defence was not an afterthought. Further, there was misdirection when the learned trial judge did not address his mind to the evidence of SD2, SD3, SD4 and SD5 (*Boonsoom Boonyanit v. Adorna Properties Sdn Bhd*; refd). Hence, the learned trial judge's decision was liable to judicial correction since the appeal records did not suggest that there had been any attempt on the judge's part to critically examine the evidence of those defence witnesses. (paras 15, 19, 22 & 23)

(3) Looking at the factual matrix of the case and having given consideration to the learned trial judge's comment that the appellant should have called L/Cpl Azhar, this court does not think that the judge drew any adverse inference against the appellant's failure as alleged. But, the fact that the judge did comment on the said failure was really unnecessary and uncalled for. As held in the case of *Tan Foo Su v. PP*; it was not the duty of an accused person to prove his innocence far less to produce or to bring a particular witness to support his story. Failure of the defence to produce a particular witness must not be made the subject of adverse comment by the court otherwise it would amount to a misdirection. (para 24)

(4) Upon careful examination of the records of appeal, nowhere was it found in the judgment of the learned trial judge the kind of balancing exercise as dictated by ss. 14 and 15 of the Act before admitting similar fact evidence against the appellant. Again, this was a misdirection (*PP v. Mohamad Roslan Desa*; refd; *R v. Scarrot*; refd). (para 31)

Bahasa Malaysia *Translation Of Headnotes*

Ketua Inspektor Hafiz ('SP7') bersama-sama dengan SP1 dan SP5 telah mengambil kedudukan serang hendap di tepi jalan dan kira-kira sepuluh minit kemudian, SP5 dan SP7 melihat tertuduh ('perayu') menghampiri atas sebuah motosikal. Hasil carian badan yang dijalankan, SP5 menjumpai satu kantung kecil berwarna hitam dalam poket kanan seluar jeans perayu dan atas pemeriksaan lanjut, lima bungkusan plastik yang mengandungi bahan tumbuhan kering, yang kemudian disahkan adalah kanabis, telah dijumpai. Ini

membentuk perkara pertuduhan di bawah s. 6 Akta Dadah Berbahaya 1952 bagi pemilikan 30.40 gram kanabis terhadap perayu. Berkaitan kes pengedaran, kes pihak pendakwaan adalah bahawa, atas soal siasat, perayu telah membawa SP7 dan pegawainya ke sebuah rumah di Kg. Parit Seberang ('rumah tersebut'). Perayu, yang dikawal oleh L/Kpl Azhar, memasuki bilik di dalam rumah tersebut lalu menunjuk ke arah sebuah almari. Perayu kemudiannya mengambil keluar satu ketulan bahan tumbuhan kering yang disaluti dengan plastik lutsinar daripada almari itu dan diserahkannya kepada SP7. Bahan itu telah kemudiannya disahkan sebagai kanabis. Dalam pembelaannya, perayu mempertikaian versi yang diberikan oleh pihak pendakwaan dan menyatakan bahawa dia tidak pernah menyerahkan kanabis itu kepada polis. Walhal, perayu berhujah bahawa ianya adalah kerja pihak polis yang telah menggeledah bilik itu dan menjumpai dadah di dalam almari dan juga di bawah meja tetapi perayu tidak mempunyai sebarang pengetahuan berkenaan dadah tersebut. Sepupu perayu dan bapa saudara perayu, si mati, ('Kamil') yang merupakan penagih dadah, mempunyai akses ke dalam bilik tersebut. SD2, seorang pegawai dari pusat serenti, mengesahkan bahawa Kamil adalah seorang penagih dadah manakala, SD3 dan SD4, yang merupakan adik-beradik perayu dan SD5, bapa saudara perayu, telah memberikan keterangan bahawa Kamil tinggal di dalam rumah tersebut dan sepupu perayu, yang telah menghilangkan diri selepas penangkapan perayu, telah mempunyai akses bebas ke dalam bilik itu di mana dadah dijumpai. Pada akhir kes pembelaan, yang arif hakim perbicaraan memutuskan bahawa pembelaan perayu adalah satu penafian kosong dan rekaan. Ianya juga diputuskan bahawa fakta perayu ditangkap berkenaan 30.40 gram kanabis yang dijumpai pada awalnya telah menarik aplikasi s. 15 Akta Keterangan 1950 ('Akta') di mana ianya menunjukkan pengetahuan perayu terhadap dadah tersebut. Perayu didapati bersalah, disabit dan dihukum mati bagi kesalahan mengedar 993.8 gram kanabis. Oleh itu rayuan ini oleh perayu. Dua isu utama yang dibangkitkan oleh perayu di mahkamah ini adalah: (i) bahawa yang arif hakim tersalah arah apabila beliau gagal menghargai kes pembelaan; dan (ii) bahawa yang arif hakim tersalah arah apabila beliau bertindak atas keterangan di pertuduhan pertama sebagai keterangan sama fakta untuk membuktikan pengetahuan berkenaan pertuduhan pengedaran dadah. Tambahan lagi, perayu menghujahkan bahawa inferens bertentangan oleh yang arif hakim di bawah s. 114(g) Akta Keterangan 1950 atas kegagalan pembelaan memanggil L/Kpl Azhar telah memprejudis perayu.

Diputuskan (membenarkan rayuan, mengenepikan sabitan dan hukuman; melepaskan dan membebaskan perayu)
Oleh Balia Yusuf Wahi HMR menyampaikan penghakiman mahkamah:

(1) Pemeriksaan balas SP5, SP7 dan SP8 oleh perayu dan mengajukan kepada saksi-saksi versi perayu adalah sebahagian daripada proses pembelaan. Apa yang dibuat oleh perayu adalah melaksanakan hak dan tugasnya mengajukan pembelaannya semasa kes pihak pendakwaan itu sendiri. Perayu membentuk pembelaannya sebagai keterangan di peringkat pembelaan apabila dia bersama-sama dengan SD2, SD3, SD4 dan SD5 memberi keterangan. Oleh itu, pembelaan yang dikemukakan oleh perayu bukanlah satu penafian kosong dan pastinya adalah jauh daripada menjadi satu rekaan.

(2) Dua atau tiga orang lain mempunyai akses ke dalam bilik tersebut dan dadah mungkin diletakkan di sana oleh orang-orang tersebut atau pun dimiliki oleh Kamil yang sah seorang penagih dadah. Akses kepada bilik tersebut kepada orang-orang lain dibangkitkan apabila SP3 dan SP8 diperiksa balas. Adalah jelas bahawa pembelaan bukanlah semata-mata satu rekaan. Tambahan lagi, yang arif hakim telah tersalah arah apabila beliau tidak menimbangkan kepentingan keterangan SD2, SD3, SD4 dan SD5 (*Boonsoom Boonyanit v. Adorna Properties Sdn Bhd*; dirujuk). Oleh itu, keputusan yang arif hakim layak untuk pembetulan kehakiman memandangkan rekod rayuan tidak menunjukkan bahawa terdapat sebarang percubaan dari hakim untuk memeriksa secara kritikal keterangan saksi-saksi perayu tersebut.

(3) Melihat kepada matriks fakta kes dan setelah memberi pertimbangan kepada komen yang arif hakim bahawa perayu sepatutnya memanggil L/Kpl Azhar, mahkamah ini tidak berpendapat bahawa hakim telah menyimpulkan sebarang anggapan bertentangan terhadap kegagalan perayu seperti yang didakwa. Namun begitu, fakta bahawa hakim telah memberi komen atas kegagalan tersebut adalah tidak diperlukan. Seperti diputuskan dalam kes *Tan Foo Su v. PP*; bukanlah tugas seseorang tertuduh untuk membuktikan ketidakbersalahannya apatah lagi untuk mengemukakan atau membawa seseorang saksi untuk menyokongnya. Kegagalan pembelaan untuk mengemukakan seseorang saksi tidak boleh dijadikan subjek komen bertentangan oleh mahkamah, jika tidak ianya akan menjadi satu salah arahan.

A **(4)** Atas pemeriksaan rekod rayuan, tiada dijumpai di mana-mana dalam penghakiman yang arif hakim berkenaan jenis pertimbangan seperti yang diperuntukan oleh ss. 14 dan 15 Akta sebelum menerima keterangan fakta sama terhadap perayu. Sekali lagi, ini adalah suatu salah arahan (*PP v.* B *Mohamad Roslan Desa*; dirujuk; *R v. Scarrot*; dirujuk).

Case(s) referred to:
Azahan Mohd Aminallah v. PP [2005] 1 CLJ 374 CA ***(refd)***
Boonsoom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 CA ***(refd)***
C *Junaidi Abdullah v. PP [1993] 4 CLJ 201 SC* ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Makin v. AG for New South Wales [1894] AC 57 ***(refd)***
R v. Scarrott [1978] QB 1016 ***(refd)***
Tan Foo Su v. PP [1967] 1 LNS 179 HC ***(refd)***
D *Tan Kim Ho & Anor v. PP [2009] 3 CLJ 236 FC* ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 6, 39A(1)
Evidence Act 1950, ss. 14, 15, 114(g)
E Penal Code, ss. 302, 304(b)

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Siti Rafidah Zainuddin DPP

[Appeal from High Court, Seremban; Criminal Trial No: 45-3-2007]

F

Reported by Kumitha Abd Majid

JUDGMENT

G

Balia Yusof Wahi JCA:

[1] The appellant was convicted by the Seremban High Court for trafficking in 993.8 grams of cannabis and was sentenced to death. At the same trial, the appellant was also charged for H possession of 30.40 grams of cannabis under s. 6 of the Dangerous Drugs Act 1952 and punishable under s. 39A(1) of the same Act. For the said offence, he was found guilty and sentenced to three years imprisonment and three strokes of the *rotan*.

I

The Prosecution's Case

[2] On 8 July 2006 at about 8.30pm, Chief Inspector Hafiz ("SP7") together with SP5, SP1 and his men went to Kg Jati on a crime prevention round against drug trafficking. They took up ambush position at the road side and about ten minutes later SP7 and SP5 saw a male person approaching on a motorcycle. The said male person was later identified as the appellant. The appellant was stopped by SP5 who then carried out a body search and found from the appellant's right jeans pocket a small black pouch. On further examination, SP5 found five plastic packets containing dried plant materials suspected to be cannabis. This formed the subject of the charge under s. 6 of the Dangerous Drugs Act 1952 against the appellant.

[3] The appellant was taken to the Kuala Pilah police station and was later interrogated by SP7. Resulting from the interrogation, the appellant then led SP7 and his men to a house no. 19A Kg Parit Seberang (hereinafter referred to as the "said house") with his hand cuffed to the back. Inside the house were the appellant's adopted sister ("SP3") and his mother (now deceased) and his grandmother. The appellant then showed a room to the police party. It was closed. SP7, SP5 and the appellant who was guarded by L/kpl Azhar entered the room. Upon entering the said room, both SP7 and SP5 could sense a strong smell of *ganja*. The appellant indicated he wanted to show something and SP7 instructed L/kpl Azhar to change the appellant's handcuff from back to the front. The appellant then pointed to a cupboard and from among the clothes took out a block of dried plant material wrapped in a transparent plastic and handed it over to SP7. The appellant then took out a red plastic container from underneath a table and also handed it over to SP7. Inside the plastic container an aluminium package containing a block of dried plant materials suspected to be cannabis was found.

[4] Analysis by the government chemist ("SP4") confirmed that the block of dried plant materials recovered from the room were cannabis, 993.8 grams in weight.

[5] At the end of the prosecution's case the learned trial judge found a *prima facie* case was established against the appellant and called upon him to enter his defence.

A

The Defence Case

[6] In his defence, the appellant gave evidence on oath and called four other witnesses. The appellant disputed the version given by the prosecution. He never handed over the cannabis to
B the police. The police ransacked the room and found the drugs in the cupboard and from underneath the table. He has no knowledge about the drugs and that others had access to his room namely his cousin Aboy and his uncle Kamil. The details of the appellant's defence has been fully set out by the learned trial
C judge at pp. 34-35 of the appeal record.

[7] The other four defence witnesses gave evidence to the fact that the appellant's uncle, Kamil also stays in the house and that he was a confirmed drug addict. Aboy, the cousin has a free access to the room as he was very close with the appellant. SD2,
D an officer from the Pusat Serenti confirmed that Kamil was a drug addict and an inmate at the Pusat Serenti while SD3 and SD4 were the appellant's siblings and SD5 the appellant's other uncle. The evidence of SD3, SD4 and SD5 states that Kamil stays in the same house and Aboy who is very close to the appellant has
E a free access to the house and the room where the drugs were found. Kamil has passed away and Aboy has disappeared after the appellant's arrest.

The Trial Judge's Decision

F

[8] At the end of the defence case, the trial judge held that in essence the defence is one of bare denial and an afterthought. The appellant was found guilty, convicted and was sentenced to death for the offence of trafficking in 993.8 grams of cannabis. Hence
G this appeal.

The Appeal

[9] Before us, learned counsel for the appellant raised two main grounds of appeal which are as follows:

H

(a) that the learned trial judge misdirected himself when he failed to appreciate the defence case; and

(b) that the learned trial judge misdirected himself when His Lordship acted on the evidence of the first charge as similar
I fact evidence to prove knowledge in respect of the trafficking charge.

[10] In support of the first ground, learned counsel argued that the trial judge erred in holding the appellant's defence as an afterthought and a bare denial. Counsel submitted that the trial judge has erred in failing to appreciate that the appellant in his defence has challenged the prosecution's version of events that took place in the house. The appellant further complained of the trial judge's comment on the defence failure to call a certain witness and in invoking s. 114(g) of the Evidence Act 1950 against him.

[11] The appellant's challenge on the prosecution's version of events that took place was taken during the cross-examination of SP5, SP7 and SP8. In his written submission, learned counsel has referred to us the specific challenges made to these witnesses as follows:

Challenges by the appellant on SP5's evidence:

(i) At pg 25 of the Appeal Record

S: Bila masuk bilik itu awak terus arah anggota gelidah bilik itu.

J: Tak setuju.

(ii) At pg 27 of the Appeal Record

S: Saya katakan kepada awak barang salah yang dikata diserah oleh OKT sebenarnya barang salah yang dijumpai hasil penggelidahan dalam rumah khususnya dalam bilik tersebut.

J: Tak setuju.

(iii) At pg 30 of the Appeal Record

S: OKT tidak pernah pada mana-mana masa mengeluarkan apa-apa barang dan menyerahkan kepada Insp. Hafiz pada malam tersebut.

J: Tak setuju.

(iv) At pg 32 of the Appeal Record

S: Awak tidak bercakap benar tentang:

(1) Bagaimana serbuan dijalankan

(2) Bagaimana barang salah dijumpai dalam rumah.

J: Tidak setuju.

Challenges to the evidence of SP7:

(i) At pg 41of the Appeal Record with regard to the search list (Ex. P22):

S: Awak tidak masukkan barang kes ini dijumpai oleh sesiapa sebab barang kes dijumpai oleh anggota awak.

J: Tidak setuju.

(ii) At pg 43 of the Appeal Record

S: Ketika sampai di rumah OKT awak dan anggota terus buat penggelidahan.

J: Tak setuju.

(iii) At pg 44 of the Appeal Record

S: Setelah awak dan anggota menggelidah barulah awak dan anggota menjumpai barang salah.

J: Tak setuju.

S: Keterangan awak tentang gari dan juga apa yang berlaku dalam bilik tidak benar.

J: Tak setuju.

Challenge to the evidence of the Investigating Officer (SP8):

S: Barang-barang salah yang dijumpai adalah hasil serbuan dan penggelidahan anggota dalam rumah itu.

J: Tak setuju.

[12] From the above transcriptions it seems clear to us that the challenges put forth by the appellant was in respect of how the impugned drugs were recovered from the room. The appellant's version is that the police party ransacked his room and found the drugs themselves. It is also part of his defence that he did not bring the police party to his room, instead he was taken there.

[13] We are of the view that the appellant's cross-examination of SP5, SP7 and SP8 and putting to these witnesses his version is part of the process of his defence. What the appellant did was merely exercising his legitimate right and duty of advancing his defence during the prosecution's case itself. He crystallised the said defence as evidence during the defence stage when he together with SD2, SD3, SD4 and SD5 gave evidence. In our view, the defence put forth by the appellant is not a bare denial and certainly far from being an afterthought. We disagree with the learned trial judge.

[14] In *Tan Kim Ho & Anor v. PP* [2009] 3 CLJ 236, it was held as follows:

> In our adversarial system of justice, the duty of each party is to show that his case is the truth. This is done by him adducing his own witnesses to support his contention. When it is the

> Plaintiff or prosecutor who is adducing the evidence, his witnesses are subject to cross-examination by the defence or the accused person. When a prosecution witness makes a statement of fact which is disagreed to by the defence it becomes the defence's duty to, in whatever way, put to the Plaintiff or prosecution witness that what the witness has said is not true. In addition, he could also use the Plaintiff's or prosecution's witnesses to adduce evidence to support his defence and to indicate what his defence is. This he is required to do to enable the Plaintiff or prosecution to bring out evidence to disprove what the defence intends to adduce. If the defence does not in any way indicate by cross-examination of those facts those statements made by the Plaintiff's or prosecution's witnesses must be accepted as true. Even if the Plaintiff's or prosecution's witness does not say anything relating to the defence case, it is still the duty of the defence to bring out his case during the Plaintiff's or prosecution's case.

[15] The appellant's defence was that he did not know about the drugs found in the room. The room is accessible to at least two or three other persons. The drugs could have been placed there by these other persons or could have belonged to his uncle Kamil, a confirmed drug addict. The accessibility of the room to these other persons was brought up when SP3 and SP8 were cross-examined (pp. 9-10 and 55 of the appeal record). Clearly, the defence is not an afterthought.

[16] In his judgment, the learned trial judge found that certain facts were never put or suggested by the defence during the prosecution's case. They only surfaced during the defence. Hence His Lordship held them to be afterthoughts. These facts are adumbrated in paras. a-i of His Lordship's judgment at pp. 135-141 of the appeal record. We do not deem it necessary to reproduce those matters here but suffice to say that even if they are "afterthoughts" as the learned trial judge has found them to be, they do not in any way help bolster the defence case and neither do they strengthen the prosecution's case.

[17] In further support of his contention that the trial judge has misdirected himself in failing to appreciate the defence case, learned counsel submits that the trial judge has failed to consider the evidence of SD2-SD5 which supports the appellant's version and defence that he was not in exclusive control of the room where the drugs were found and the drugs could have been placed there or belonged to others who had access to the room.

[18] We agree with the learned counsel's submission that the learned trial judge did not consider and appraise the evidence of these defence witnesses. In para. 25 of His Lordship's ground of judgment (pp. 129-130 of the appeal record) a summary of the appellant's evidence was tabulated but nowhere else do we find His Lordship's consideration of the other defence witnesses' evidence. To use the learned counsel's words, "His Lordship brushed it aside without sufficient consideration". To illustrate his point, learned counsel cited a passage from the judgment at pp. 142-143 of the appeal record where His Lordship said:

> Pihak pembelaan cuba menunjukkan bahawa kawan-kawan OKT bebas masuk ke dalam bilik OKT yang tidak pernah berkunci itu bagi mewujudkan fakta bahawa mungkin dadah itu milik orang lain atau dadah itu disimpan di dalam bilik OKT tanpa pengetahuan OKT oleh orang lain. Pada pandangan Mahkamah kemungkinan-kemungkinan yang cuba diwujudkan ini bukan suatu "reasonable doubt" kerana kes pendakwaan adalah OKT yang menunjukkan tempat ia menyimpan dan mengambil sendiri dadah itu.

[19] We found the trial judge did not at all address his mind to the evidence of SD2, SD3, SD4 and SD5. This is a misdirection.

[20] We are in agreement with the learned counsel's submissions. The Federal Court in *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 has set out what judicial appreciation of evidence means. It said:

> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness's evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.

[21] Again, in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229, Chang Min Tat FJ at p. 234 reiterated:

> Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

[22] Finally, we would also echo the words of Gopal Sri Ram JCA (as he then was) in *Boonsoom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ 17 wherein His Lordship had stated:

> ... a trier of facts, in order to arrive at a decision according to law, must judicially appreciate the evidence led before him upon the issue called for resolution. A decision arrived in absence of a judicial appreciation of evidence is liable to judicial correction. Judicial appreciation is concerned with the process of evaluating the evidence for the purpose of discovering where the truth lies in a particular case. It includes, but is not limited to, identifying the nature and quality of evidence, assigning such weight to it as trier of fact deems appropriate, testing the credibility of oral evidence against contemporaneous documents as well as the probabilities of the case and assessing the demeanour of witnesses.

[23] Our perusal of the records do not suggest that there has been any attempt on the part of the trial judge to critically examine the evidence of those defence witnesses called by the appellant to support his case. This merits our intervention and the learned trial judge's decision is liable to judicial correction.

Section 114(g) of the Evidence Act 1950

[24] The drawing of an adverse inference by the learned trial judge under s. 114(g) of the Evidence Act 1950 on the failure of the defence to call L/Kpl Azhar is according to the learned counsel prejudicial to the appellant. We agree with the learned counsel that at p. 139 of the appeal record the learned trial judge did comment on that failure of the defence. In his evidence, the appellant stated that Koperal Idurs (SP5) was the police personnel who escorted him and not L/Kpl Azhar. This was only brought up by the appellant when he gave evidence in his defence and was never raised during the prosecution's case when SP7 or SP5 was giving evidence. His Lordship held this was an afterthought and went further to say that the defence should have called L/Kpl Azhar who was later offered to the defence. Looking at the factual matrix of the case and having given our anxious consideration of that comment made by the learned trial judge, we do not think that the learned trial judge draw any adverse inference against the appellant's failure as alleged. But we are

satisfied that His Lordship did comment on the failure which we think is really unnecessary and uncalled for. Perhaps, it would be timely for us to remind trial judges of the words of Raja Azlan Shah J (as His Majesty then was) in *Tan Foo Su v. PP* [1967] 1 LNS 179 which goes:

> It is not the duty of an accused person to prove his innocence, far less to produce or to bring a particular witness to support his story. Failure of the defence to produce a particular witness must not be made the subject of adverse comment by the court otherwise it would amount to a misdirection.

Similar Fact Evidence

[25] At p. 32 of the judgment (p. 127 of the appeal record), the learned trial judge held that the fact that the appellant was arrested in respect of the 30.40 grams of cannabis found on him earlier, attracts the application of s. 15 of the Evidence Act 1950. These facts according to the learned trial judge impute knowledge of the appellant. The relevant part of His Lordship's judgment is appended below:

> Fakta bilik tersebut berbau Kanabis dan OKT ditangkap sebelum ini dengan Kanabis seberat 30.40 gram membolehkan "similar facts evidence" di bawah Seksyen 15 Akta Keterangan 1950 digunapakai. Kesemua fakta kes ini merangkumi kelakuan OKT dan pengetahuan OKT akan kedudukan sebenar semua Kanabis seberat 993.8 gram tersebut bukanlah satu kebetulan sebaliknya OKT sememangnya mengetahui akan kewujudan Kanabis di dalam biliknya sendiri.

[26] Learned counsel for the appellant took objection to this and submitted that the learned trial judge has misdirected himself in two aspects, namely:

(a) firstly, the first charge against the appellant is for possession of 30.40 grams of cannabis while the second charge is for trafficking and strictly speaking there is no similarity in respect of both the charges; and

(b) secondly, even if there is similarity, the trial judge before acting on the similar fact evidence must undertake a weighing exercise and ask whether the prejudicial effect of that similar fact evidence would be outweighed by its probative value.

[27] For ease of reference we append the relevant provisions of ss. 14 and 15 of the Evidence Act 1950, minus the illustrations:

> 14. Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling is in issue or relevant.
>
> 15. When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that the act formed part of a series of similar occurrences, in each of which the person doing the act concerned, is relevant.

[28] The principle of law relating to similar fact evidence as laid down in *Makin v. AG for New South Wales* [1894] AC 57 may summarily be stated as follows:

> (1) It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried; and
>
> (2) … the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged were designed or accidental, or to rebut a defence which would otherwise be open to the accused.

[29] In support of his submission, learned counsel referred to us the case of *Junaidi Abdullah v. PP* [1993] 4 CLJ 201 where at p. 208 Mohamed Azmi SCJ said:

> On the principle laid down in *Makin*'s case and *Boardman*'s case, we are of the opinion that where the purpose of adducing evidence of similar facts or similar offences is justifiable on the ground of relevancy and necessity to rebut and defence which would otherwise be open to the accused (in addition to those under ss. 14 and 15 of the Evidence Act 1950), it is admissible in evidence provided the probative value of such evidence out weighs its prejudicial value. There must be a real anticipated defence to be rebutted and not merely 'crediting the accused with a fancy defence' as emphasized by the Privy Council in *Noor Mohamed v. R* at p. 192.

[30] In *Azahan Mohd Aminallah v. PP* [2005] 1 CLJ 374, the accused was charged with raping a 15-year-old girl. The prosecution in the course of the trial had adduced prejudicial similar fact evidence of previous acts of sexual intercourse. Gopal Sri Ram JCA (as he then was) speaking on the admissibility of similar fact evidence has the following to say at pp. 385-386 of the report:

> A court when deciding whether to admit similar fact evidence must carry out a balancing exercise by weighing the probative value of such evidence against its prejudicial effect as impliedly required by ss. 14 and 15 of the Evidence Act 1950. The court would be justified in admitting the evidence where its probative value is outweighed by its prejudicial effect. See, *Boardman v Director of Public Prosecutions* [1975] AC 421, *Director of Public Prosecutions v. PP* [1991] 2 AC 447; *Junaidi Abdullah v. PP* [1993] 2 AMR 2209; [1993] 3 MLJ 217; *PP v. Teo Ai Nee* [1995] 2 SLR 69; *Tan Meng Jee v. PP* [1996] 2 SLR 422; *Lee Kwang Peng v. PP* [1997] 3 SLR 278. In *Tan Meng Jee v. PP*, Yong Pung How CJ when delivering the judgment of the Singapore Court of Appeal said of the equipollent provisions in the Singapore Evidence Act:
>
> Be that as it may, we are of the opinion that the admission of similar fact evidence, at least for the purposes identified in ss. 14 and 15 of the Evidence Act, should be governed by the balancing test adopted by the House of Lords in Boardman's case. Such an approach is warranted both in principle as well as on the wording of the legislation itself. As to the former, it has been argued above that the rationale of the rule excluding similar fact evidence is so that every person charged with an offence may only be convicted upon being proved to have committed the acts within the charge. It would be subverting established jurisprudence to allow a conviction based on the particular disposition of the accused - based on the contention that the accused is that type of person who would commit such an offence. On the other hand, there may be cases where the interest of justice clearly outweigh any prejudicial dangers inherent in the evidence. With respect we entirely agree with the aforesaid dictum, coming as it does from so authoritative a source as His Honour the Chief Justice of Singapore. Further, like His Honour, we also find illustration (o) to s. 14 of the Evidence Act 1950 to be relevant. That illustration reads:
>
> > A is tried for the murder of B by intentionally shooting him dead. The fact that A on other occasions shot at B is relevant as showing his intention to shoot B. The fact that A was in the habit of shooting at people with intent to murder them is irrelevant.

> So, here too, PW2's evidence as to the appellant's previous acts of intercourse with her was relevant, that is to say, admissible. But that does not, on the authorities we have cited, relieve the court of determining whether the probative value of her evidence outweighed its prejudicial effect. We have carefully examined the record and nowhere in the judgment of the Sessions Court is there the kind of balancing exercise dictated by ss. 14 and 15 of the Evidence Act. This is a serious misdirection. It occasioned a serious miscarriage of justice as the Sessions Court acted on the similar fact evidence to add three further charges against the appellant.

[31] We too have carefully examined the records of appeal before us and nowhere do we find in the judgment of the learned trial judge the kind of balancing exercise as dictated by ss. 14 and 15 of the Evidence Act 1950 before admitting the similar fact evidence against the appellant. Again, this is a misdirection.

[32] Before leaving the issue, it is pertinent to address the point raised by the learned counsel namely on the similarity of the two offences or charges against the appellant.

[33] On this issue of whether there is similarity between the offence of possession of 30.40 grams of cannabis for which the appellant was arrested earlier and charged and the present charge of trafficking in 993.8 grams of the same drug and whether similarity of the offences is a prerequisite, we can do no better than by referring to the case of *Public Prosecutor v. Mohamad Roslan bin Desa* [Mahkamah Persekutuan Rayuan Jenayah No. 05-28-2007(K)].

[34] In the said case, the respondent was charged for the offence of murder under s. 302 of the Penal Code on 28 December 1998. During the trial before the High Court, the prosecution attempted to introduce the record of proceedings in the Sessions Court where the respondent had pleaded guilty to an offence under s. 304(b) of the same Code which was committed on 11 December 1998. The High Court has rejected the evidence on the ground that there is no similarity between the two cases against the respondent. On appeal to the Federal Court by the Public Prosecutor, one of the grounds raised was similar fact evidence. The Federal Court, in a judgment delivered by Arifin Zakaria HBM (as he then was) stated the following as the proper test for the admission of similar fact evidence:

> The Courts below rejected the similar fact evidence on the basis that there was no striking similarity between what happened in the earlier case and the present case. It should perhaps be noted that

A the House of Lords in *DPP v. P* had retracted from the test laid down in Boardman as to the requirement of "striking similarity" and said that it was inappropriate to single out "striking similarity" as an essential element in every case. But following Boardman it was held that the essential feature of admissibility of such evidence is whether its probative force in support of the charge is B sufficiently great to make it just to admit the evidence notwithstanding that its prejudicial effect on the accused tending to show that he was guilty of another offence. Whether the evidence has sufficient probative value to outweigh its prejudicial effect must in each case be a question of degree. The test has C since been authoritatively laid down in *DPP v. P* in terms of probative value as against its prejudicial effect. There is force in saying that the decision in *DPP v. P* is in line with ss. 14 and 15 of the Evidence Act as "striking similarity" has never been a requirement of the said sections.

D **[35]** We also find it useful to recall the words of Scarman LJ in *R v. Scarrott* [1978] QB 1016 on this issue of similarity of facts:

Positive probative value is what the law requires, if similar fact evidence be admissible. Such probative value is not provided by the mere repetition of similar facts; there has to be some feature E or features in the evidence sought to be adduced which provides a link, an underlying link as it has been called in some of the cases. The existence of such a link is not to be inferred from mere similarity of facts which are themselves so commonplace that they can provide no sure ground for saying that they point F to the commission by the accused of the offence under consideration.

[36] The authorities are clear that the similarity test is not a prerequisite for the admission of similar fact evidence.

G **[37]** We sum up by saying that this is a case which is riddled with a number of unsatisfactory features. We are of the unanimous view that it is unsafe to uphold the conviction recorded against the appellant. The appeal is allowed and we set aside the conviction and sentence on the trafficking charge. The appellant H is hereby acquitted and discharged.

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